1989

Sharleen M. McReynolds v. Glenn L. McReynolds: Brief of Respondent

Utah Court of Appeals

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IN THE COURT OF APPEALS

STATE OF UTAH

SHARLEEN M. McREYNOLDS,

Plaintiff-Appellant, Case No. 890172-CA

vs.

GLENN L. McREYNOLDS,

Defendant-Respondent.

BRIEF OF RESPONDENT

APPEAL FROM THE ORDER AND JUDGMENT OF
THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH, THE HONORABLE GEORGE E. BALLIF, PRESIDING

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CATEGORY NO. 14b

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

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BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from an Order and Judgment arising out of a bench trial held May 18, 1988. This Court has jurisdiction pursuant to Utah Code Annotated Section 78-2a-3(2)(h) (Supp. 1988).

ISSUE PRESENTED

Based upon equitable principles, did the trial court appropriately determine that since the minor children had been adequately provided for by Plaintiff/Appellant and had purposefully and intentionally frustrated the efforts by Defendant/Respondent to exercise his right of visitation was it appropriate for the District Court not to award judgment for the unpaid amount of child support based upon Defendant's actions in

frustrating visitation.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings. This is an action upon Plaintiff's Petition filed August 4, 1986, to recover unpaid child support from the Defendant (R. 55).

In a bench trial, the trial court found that the unpaid child support for the period August 1986 through May 1988 was the sum of $3,520.00 (R.284). The Court also found, however, that Plaintiff and her current husband purposefully intimidated the Defendant and frustrated his attempts to visit with his children by repeatedly changing their address and telephone number. (R.284).

The Court determined that during the period of time in question that the children were adequately supported by their mother and that this was not an action for the benefit of the children but for the benefit of the mother (R. 328).

In light of the circumstances, it was the Court's opinion that the conduct of the Plaintiff would constitute contempt of the Court's Order relative to visitation and in structuring an equitable remedy, determined that it was appropriate not to grant Plaintiff judgment for the accrued child support (R. 327-328).

Plaintiff then filed a Motion for New Trial or Amendment of Judgment on November 7, 1988 (R.298), which motion was denied by

the Court's Ruling of February 21, 1989 (R. 326). Plaintiff, thereafter, perfected this appeal which goes only to the issue of judgment for unpaid child support from August, 1986, through May, 1988.

B. Statement of Facts. The Plaintiff and Defendant in this case were divorced on March 7, 1984, pursuant to a Decree of Divorce entered in Evanston, Wyoming (R. 28). On June 29, 1984, an Order and Judgment was entered in Davis County, Utah, pertaining to those matters not adjudicated by the Wyoming Decree (R. 52-54). Those matters included the care, custody, and control of the minor children of the parties, visitation for the Defendant, child support, alimony, debts and division of marital property (R. 52-54).

For purposes of this appeal, the only relevant time encompasses the period from August 4, 1986, through May, 1988. (See Appellant's brief page 2.)

Subsequent to the trial, the Court, in its Findings of Fact, found that the accrued child support during the relevant period totaled $3,520 (R. 284 P.2).

The trial court found it appropriate not to award judgment for said amount based upon its findings that the Plaintiff and her current husband

> purposefully intimidated the Defendant and frustrated his attempts to visit with his children by repeatedly

> changing their address and telephone numbers, forcing calls about the children through Plaintiff's present husband and a law firm answering and forwarding facility and have not cooperated in meeting scheduled telephone calls from Defendant and the children as ordered by Domestic Relations Commissioner, all of which have caused Defendant considerable anxiety, expenditure of time and expense which could have been avoided by reasonable efforts on the part of the Plaintiff and her husband to afford him his visitation rights (R. 284, P. 3).

The District Court, in its Ruling denying Plaintiff's Motion for New Trial, sheds further light on the basis for the Court's opinion. The Court specifically determined that there was no evidence presented that the children were not adequately supported during the relevant time and, therefore, concluded that the Petition for accrued child support payments was not an action for the benefit of the children but for the benefit of the mother (R. 328). The Court expressed the opinion that the conduct of Plaintiff would constitute a contempt of the Court's orders relative to visitation (R. 326-328). The Court further determined that it would be difficult to fashion a commensurate punishment for the wrong the Plaintiff had committed and determined that it was appropriate not to grant Plaintiff a judgment for the accrued child support (R. 326-328, Add. A).

SUMMARY OF ARGUMENT

Defendant/Respondent does not take issue with Plaintiff's

arguments concerning the public policy and concern of insuring that children are properly supported by their parents. Respondent, however, stopped one step too short in their consideration of the issues at hand. The Court, in its Ruling on the Motion for a New Trial, attached as Addendum A, clearly determined that the children had adequately been provided for and, consequently, this was "not an action for the benefit of the children but for the benefit of the mother" (Addendum A).

Once the Court has determined that the needs of the children have been adequately attended, the issue then becomes a question of whether the mother/Plaintiff should be entitled to recover the accrued child support payment when she has purposefully interfered with the father/Defendant's right to visitation as ordered by the Court.

The Court, in fashioning a remedy based upon equitable principles, could not, in good conscience, award judgment which would go to the benefit of the mother as opposed to the children in light of her contemptuous actions.

The Court, in considering the equitable principles stated:

> Whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the Court will be shut against him; the court will refuse to award him any remedy (Citation omitted) (R. 259-260).

For the reasons set out, the trial court properly structured a remedy based upon equitable principles to rectify the wrongs committed by Plaintiff.

ARGUMENT

THE TRIAL COURT PROPERLY RELIEVED THE DEFENDANT-RESPONDENT FROM PAYMENT OF ACCRUED CHILD SUPPORT PAYMENTS.

A. The Utah Supreme Court Has Declared that a Trial Court may Fashion Equitable Orders in Relation to Children and their Support as is Reasonable and Necessary.

In light of several Utah Supreme Court cases, the issue of child support gives rise to the argument that the trial court has power to relieve a non-custodial parent of an obligation of accrued child support, when the custodial parent has thwarted the non-custodial parent's right to visitation. The Utah Supreme Court has stated:

> Though it be conceded that under proper circumstances a court might make the payments for support money dependent upon a child's custodian making the child available for visitation rights, the right of a child to support is a paramount right which it possesses quite apart from any consideration relating to the conduct of its divorced parents (emphasis added).

Earl vs. Earl, 17 Utah 2d 156, 406 P.2d 302 (1965). In Earl, the Court pointed out that child support may or may not properly be made contingent upon compliance with visitation rights. The decision is not automatic, but depends chiefly on the welfare of the children involved--their "paramount right to support." In fact, the Court in Earl ordered a hearing to determine whether

it would be desirable to ensure compliance with visitation rights, by making support payments dependent on those rights. Id. at 303.

This reasoning is also supported in McClure vs. Dowell, 15 Utah 2d 324, 392 P.2d 624 (1964). In McClure, the non-custodial parent was not relieved from child support payments because he did not pursue that remedy in the proper forum. However, the Court did relieve him of the interest on the past due payments. Id. at 625. Thus, it is apparent that the courts may relieve a non-custodial parent from past due installments if that parent takes action in the proper forum. This equitable power has been recognized in the following cases as well. Baker vs. Baker, 224 P.2d 192 (Utah 1950); Forbush vs. Forbush, 578 P.2d 518 (Utah 1928); Owen vs. Owen, 579 P.2d 911 (Utah 1978).

This same argument is also supported in more recent cases. In 1988, the Court of Appeals of Utah decided Kelly vs. Draney, 754 P.2d 92 (1988). In Kelly, the mother sought unpaid child support from the father, and the father sought to enforce the visitation provisions of the divorce decree. Id. at 92. The Court held that:

> . . .2) trial court properly found mother in contempt for thwarting father's visitation rights, and 3) remand was required for trial court to make findings with respect to how offset of husband's unpaid child support obligation was applied against contempt fine or assessment against mother.

Id. at 92.

Hence, the Court in Kelly, did not prohibit the lower court from offsetting the father's unpaid child support against the mother's contemptuous acts in disallowing his right to visitation. In fact, the Court concluded their opinion by stating:

> We emphasize that we do not intend by these suggestions to restrict the trial court from making any orders regarding the children and his parents that it may deem appropriate in this proceeding or in any other (emphasis added).

Id. at 96.

In the present case, Plaintiff-Appellant's conduct would constitute contempt of the Court's orders with regard to visitation. And, while this is not a contempt proceeding, the cases above outlined support the argument that the trial court has the power to make the equitable decision to relieve the Defendant of his unpaid child support if it deems it appropriate. This, of course, involves taking into consideration the welfare of the children and their right to support.

B. Foregoing an Accrued Child Support Obligation is Not Improper Per Se, but Depends on the Welfare of the Children Involved.

In deciding whether or not to order or enforce certain child support payments, scores of Utah cases have held the children's welfare and their right to support as paramount:

> Both parents have an obligation to support their children. A child's right to that support is paramount. Hills vs. Hills, Utah 638 P.2d 516 (1981); Uniform Civil Liability for Support Act, U.C.A., 1953, Section 78-45-3, -4, as amended. However, it does not necessarily follow that in every instance the non-custodial parent must pay child support to the other parent. The trial court may fashion such equitable orders in relation to the children and their support as is reasonable and necessary, considering not only the needs of the children, but also the ability of the parent to pay. Anderson vs. Anderson, 110 Utah 300, 172 P.2d 132 (1946); U.C.A., 1953, Section 30-3-5, as amended.

Woodward vs. Woodward, 709 P.2d 393 (Utah 1985).

The Supreme Court in Race vs. Race, 740 P.2d 253 (Utah 1987), points out the necessity of considering the child's welfare. The facts in Race are of particular interest and importance. In Race, the trial court made a supplemental order that the children undergo therapy at Primary Children's Hospital and that visitation be integrated into that therapy when professional opinion deemed it appropriate. At the same time, the Court conditioned payment of child support upon the development of a visitation schedule. Id. at 256. In the context of these facts, the Supreme Court stated:

> Court-ordered child support is an obligation imposed for the benefit of the children, not the divorcing spouse. We find no circumstances here which justifies the trial court in deferring support until visitation between the children and their father could be worked out. In the interim, they needed and were entitled to his support. Id. at 256.

The decision in Race is not at all inconsistent with the

trial court's ruling in the present case. Rather, focusing on the children's need and welfare in each case, the two opinions are completely in accord. In Race, the children were ordered to undergo intensive therapy, which is extremely expensive, and was, in the Court's opinion, necessary. Thus, the husband's support payments were greatly needed, such that conditioning them on the development of a visitation schedule was interfering with the children's needs.

The trial court's decision in the present case, however, has not jeopardized the children's welfare. The Plaintiff is married to an attorney who earns between $35,000 to $40,000 per year. The Plaintiff is also capable of earning substantial income as a realtor. Moreover, the Plaintiff presented no evidence that her minor children were inadequately supported during the time when support was not paid. Nor was there any evidence that the State of Utah or any public agency had to provide support, or that any debt was incurred by the Plaintiff or her new husband as a result of Defendant's non-payment. Moreover, the Plaintiff deliberately interfered with the Defendant's visitation rights. Thus, in the present case, the trial court did not overlook or ignore the "children's paramount right to and need for support." Rather, the Court, taking into consideration the Plaintiff's contemptuous acts, as well as the children's welfare, merely used its

equitable powers to formulate a fair solution. Awarding child support in arrears would be a windfall to the Plaintiff, not a needed benefit to the children.

C. There is an Important Distinction Between Accrued Child Support and future Child Support-- the two Must be Analyzed Independently.

Many Utah Supreme Court cases distinguish between accrued child support and future child support. In Peterson vs. Peterson, 530 P.2d 821 (Utah 1974), the custodial mother was found in contempt for failure to comply with the visitation provisions of the divorce decree, and the husband's obligation to provide support was suspended. On appeal, the Court vacated the order and ordered the husband to begin paying the accrued child support plus interest which amounted to $11,600. However, the Supreme Court ultimately held that the contempt order and the suspension of child support were proper. Id. at 821. In explaining their decision, the Court quoted from Mr. Justice Crockett's concurring opinion in Wallis vs. Wallis, 9 Utah 2d 237, 342 P.2d 103 (1959):

> The support of the provision for alimony and support money is to provide for the current needs, and not allow the beneficiary to sit by and permit a burdensome debt to accumulate and then use it to harass the defendant.

Peterson vs. Peterson, 530 P.2d 821 (Utah 1974) (quoting Wallis vs. Wallis, 9 Utah 2d 237, 342 P.2d 103 (1959). Counsel for

Defendant is not asserting that the Plaintiff, in the present case, deliberately permitted the debt to accumulate in order to harass the Defendant at a later time. However, allowing the Plaintiff to collect the accrual of $3,500 when there has been no apparent need or any debts incurred by the Plaintiff as a result of the Defendant's nonpayment, would accomplish nothing more than to harass the Defendant.

Other jurisdictions also support the cancelation of child support in arrears due to interference with visitation rights, provided that the children's welfare is not put in jeopardy. Clayton vs. Clayton, *** Fla. App. ***, 380 So. 2d 1143 (1980); Chazen vs. Chazen, 107 Mich. App. 485, 309 N.W. 2d 613; Hudson vs. Hudson, 412 N.Y.S. 2d 242 (1978); O'Neill vs. O'Neill, 457 N.Y.S. 2d 101 (A.D. 1982); Cooper vs. Cooper, 375 N.E. 2d 925 (Ill. App. 1978).

This distinction is also consistent with the Supreme Court's decision in Race vs. Race, 740 P.2d 253 (Utah 1987). In Race, the lower court had simultaneously given a support order and conditioned its payment upon development of a visitation schedule. Id. at 256. This order, in effect, conditioned future support payments (not past) upon cooperation with visitation rights. It is this order that the Supreme Court reversed and remanded.

The Supreme Court of Wyoming has also distinguished between past and future support. In Broyles vs. Broyles, 711 P.2d 1119 (Wyo. 1985), the Supreme Court in stating the issues properly before the Court, made a distinction between child support arrearages and future child support:

> Appellee has not perfected an appeal to this court and, therefore, we will not address whether the denial of visitation privileges is a defense to an action for child-support arrearages (emphasis added).

Id. at 1123.

Hence, the Court did not address the issue of accrued child support, not because it was improper per se, but because the father had not filed a necessary cross-appeal. Only later in their discussion of future child support, did the Court state the following:

> While many older cases hold to the contrary, the modern view is that the denial of visitation rights by the custodial parent or the child does not constitute a change in circumstances which justifies the reduction or termination of the noncustodial parent's support obligation.

Id. at 1127.

Thus, denial of visitation privileges, as a general rule, might not be a defense to an action for future child support. However, denial of such privileges has been and properly can be a defense to an action for child support in arrears if, in the Court's discretion, it is equitable and would not adversely

affect the children's welfare. The distinction between past and future support is sound for one main reason: a court, with the luxury of hindsight, is capable of examining the actions of the divorced parents as well as the past needs of the children, and whether those needs have been met. However, attempting to condition parent's acts on the future needs of the children, as did the Court in Race, puts an undue risk on the children's welfare. The decision of the trial court accounts for the children's welfare and yet prevents a windfall to the Plaintiff.

CONCLUSION

The trial court properly exercised its equitable powers by relieving the Defendant from the accrued child support of $3,560.00. Current Utah case law holds the children's right to support as paramount. However, the cases do not hold that a custodial parent may deliberately interfere with a non-custodial parent's right to visitation and automatically receive all unpaid child support. The trial court has the power to protect the welfare of the children and, at the same time, to prevent an inequitable windfall to either parent. Therefore, Defendant-Respondent respectfully requests that the decision of the trial court be affirmed and that the Defendant be relieved from payment of $3,520 in unpaid child support.

DATED this 25 day of July, 1989.

RICHARD B. JOHNSON
Attorney for Plaintiff

MAILING CERTIFICATE

I hereby certify that on the 25 day of July, 1989, I mailed four true and correct copies of the foregoing to the following, postage prepaid.

Mr. D. David Lambert
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120 East 300 North
Provo, Utah 84601

Richard B. [illegible]

ADDENDUM

MOTION FOR NEW TRIAL

D. DAVID LAMBERT, (1872) for:
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Our File No. 18,889

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

SHARLEEN M. McREYNOLDS aka SHARLEEN COLTON, Plaintiff,	:	**MOTION FOR NEW TRIAL OR AMENDMENT OF JUDGMENT**
vs.	:	
GLENN L. McREYNOLDS, Defendant.	:	Civil No. CV-87-352 Judge George E. Ballif

Plaintiff, through her counsel, hereby moves the Court to open this judgment, amend the Conclusions of Law and direct the entry of a new judgment on the single issue of the delinquent child support during the period August, 1986 through May, 1988. This motion does not involve receiving any new evidence.

This motion is made pursuant to Rule 59(a), U.R.C.P. and is accompanied by a supporting memorandum of points and authorities.

DATED this 7th day of November, 1988.

D. David Lambert

D. DAVID LAMBERT, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiff

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 7th day of November, 1988.

Mr. Richard B. Johnson
Jackman and Johnson
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1327 South 800 East #300
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Julie Heelis
SECRETARY